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DOCKETS

**BEFORE THE
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.**

02 SEP -6 PM 3:16

Petition of

UNITED PARCEL SERVICE CO.
(DHL Airways, Inc.)

Docket OST-2002-13089

CONSOLIDATED ANSWER OF DHL AIRWAYS

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September 6, 2002

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Pursuant to the Department's August 16, 2002 Notice Consolidating Proceedings, DHL Airways, Inc. ("Airways") submits the following consolidated answer to the recent filings by Federal Express Corporation ("Federal Express") and United Parcel Service Co. ("UPS") once again challenging Airways's U.S. citizenship.¹

Despite unfounded and exaggerated claims to the contrary by its larger competitors, Airways is, and has been found by the Department to be, a citizen of the United States.² As the Department is well aware, that conclusion was reached only after a thorough review of Airways's reorganization, a review conducted in

¹ Consistent with the terms of that notice, Airways is timely filing this substantive response to the Federal Express filing and UPS petition without waiving its objection that both are unauthorized and their acceptance by the Department violated the Department's Rules of Practice and Airways's due process rights.

² See Letter of Assistant General Counsel for International Law to counsel for Airways, May 1, 2002, attached as Exhibit 1.

accordance with long-established procedures. As the Department also is well aware, the facts about Airways's ownership are straightforward and clear. Neither UPS nor Federal Express has presented any legitimate grounds for further investigation or proceedings to review those facts. Moreover, the filings are both procedurally invalid and without substantive merit. Therefore, and for the reasons set forth below, the Department should promptly dismiss them.

The Department should, however, consider imposing sanctions on Federal Express and UPS for their continuing violations of the Department's Rules of Practice (14 C.F.R. Part 302). Both carriers have filed numerous tendentious pleadings challenging Airways's citizenship in blatant disregard of the Department's rules. Although couched generally in high-minded prose, the total lack of substantiation for the claims leveled at Airways (and the Department), the continuing and redundant nature of these baseless filings (in this and other dockets), the patently obvious anti-competitive animus of the complainants, and the concerted nature of the offending activity clearly require a stern response from the Department. The Department should also consider investigating (1) whether this conduct constitutes an unfair competitive practice in violation of 49 U.S.C. Section 41712, and (2) whether additional sanctions should be imposed on Federal Express for violating the judicial standards of conduct applicable to all parties and their representatives in Department proceedings under the Department's Rules of Conduct (14 C.F.R. Part 300).

At their core, the most recent attacks on Airways's citizenship are inherently contradictory: on the one hand, UPS and Federal Express call for public hearings into Airways's citizenship, arguing that Airways and the Department have not provided sufficient public information to enable them to evaluate whether Airways remains a U.S. citizen (a function in any event reserved by statute to the Department); on the other, they assert, without factual support, that Airways is not a U.S. citizen. Federal Express actually accuses Airways of deliberately deceiving the Department about its citizenship, citing out-of-date and irrelevant materials and asserting that such material constitutes "evidence." The facts, however, as the Department well knows, are straightforward and clear, and demonstrate unambiguously that Airways "continues to satisfy the statutory citizenship requirements applicable to U.S. carriers." (See Exhibit 1)

As set forth more fully below:

- In 2001, Airways completed a significant corporate and management restructuring, the purpose of which was to strengthen Airways as a competitor and refocus the DHL brand in the United States. Key elements of that restructuring included an increase in U.S. ownership of the air carrier, the sale of Airways's ground operations to DHL Worldwide Express (USA), Inc. ("DHLWE") and the hiring of a new Airways's management team with extensive experience in the U.S. airline business.
- In connection with the restructuring, and consistent with applicable law, policy and precedents, the Department conducted a thorough review of Airways's continuing fitness and concluded that Airways remains a U.S. citizen.
- Federal Express and UPS have submitted duplicative, unauthorized filings asking the Department to hold a public proceeding to review again Airways's citizenship. Those filings present the same supposed evidence that Airways is not a U.S. citizen. The "evidence," however, plainly does not support any

such allegation or conclusion; in fact, to the extent this evidence is relevant, it only serves to confirm Airways's U.S. citizenship.

- Through the use of repetitive unauthorized pleadings and unsubstantiated allegations, Federal Express and UPS, the two dominant competitors in the U.S. domestic air freight market, appear to be trying to drive Airways (a much smaller competitor) out of the marketplace. Such a result would be contrary to U.S. law and Department policy and precedent, and adverse to the public interest. It would reduce competition and consumer choice, jeopardize the jobs of Airways's employees, and better enable Federal Express and UPS to exploit their market power to impose higher prices. The Department must not permit such a result. The Department should also consider launching an investigation into whether such conduct so crosses the line as to constitute an unfair competition practice in violation of 49 U.S.C. Section 41712.
- Both complainants have consistently disregarded the Department's Rules of Practice by filing numerous unauthorized pleadings that do not conform to the requirements of any form of pleading recognized by those rules. The filings are untimely and they exceed applicable page limitations. The Department should consider sanctioning Federal Express and UPS for their continuing and increasingly egregious abuse of process.
- Federal Express has distorted the record about Airways's citizenship and leveled baseless charges against Airways. This conduct may also subject Federal Express to additional sanctions under the Department's Rules of Conduct.

I. Airways is a U.S. Citizen

The relevant facts demonstrate conclusively that Airways meets the applicable test for establishing the U.S. citizenship of an air carrier. Under the statute, to be a U.S. citizen, a carrier must satisfy two conditions:

- a) at least 75 percent of the voting interest in the carrier must be owned or controlled by U.S. citizens; and

- b) at least two-thirds of the carrier's board of directors and other managing officers must be U.S. citizens.³

In addition, the Department has interpreted the statute to require that the carrier be actually controlled by U.S. citizens.⁴

As the Department's informal investigation has confirmed, Airways satisfies each of these requirements and is, therefore, a U.S. citizen.

A. Ownership

All of the voting interest in Airways is owned by two shareholders: William A. Robinson, an individual U.S. citizen residing in California, who holds 75 percent of the voting interest, and DHL Holdings (USA), Inc. ("Holdings"), a Delaware corporation, but not a U.S. citizen within the meaning of the statute,⁵ which holds the remaining 25 percent. Mr. Robinson's share holdings in Airways represent 55 percent of the carrier's total equity; Holding's shares represent the remaining 45

³ 49 U.S.C. Section 40102(a)(15)(C). The statute also requires that a carrier be organized under the laws of the United States or a State, the District of Columbia, or a territory or possession of the United States. Airways is organized under the laws of the State of Nevada.

⁴ See 56 Fed. Reg. 27696, 27700 (June 17, 1991) (DOT has interpreted the statute "to mean that, as a factual matter, the carrier must be actually controlled by U.S. citizens.") Both Federal Express and UPS assert that Airways has the burden of demonstrating that it is U.S.-owned and controlled. See *Federal Express Filing*, at 1; *UPS Petition*, at 11. This is incorrect. Airways has the burden to demonstrate that it meets the two conditions explicitly referenced in the statute; however, once Airways has discharged that burden, it is presumed to have met the actual control requirement. See *Uraba, Medellin & Central Airways, Inc.*, 2 C.A.B. 334, 337 (1940) ("the fact remains in law that it is presumed that only the nominees of the stockholders possess the power to control its policies and actions"). Federal Express cites the *Uraba* case as the source of the actual control test, but, as stated above, mischaracterizes the evidentiary burden. *Federal Express Filing*, at 15 & n.31.

⁵ Prior to the reorganization, Holdings was a U.S. citizen, but it is now wholly owned by DHL International Ltd. Deutsche Post A. G. ("Deutsche Post"), at this time, owns slightly less than 51% of DHL International. That percentage is expected to increase. See Letter of Stephen H. Lachter to Dorothy Beard dated July 1, 2002 (Docket OST-01-10052).

percent. Although Mr. Robinson was among the founders of DHL, he is not now an officer, director, or employee of Holdings, any of the other companies around the world that operate under the DHL brand name, or Deutsche Post.⁶ This straightforward corporate structure clearly satisfies the first element of the citizenship test.

B. Governance and Management

As part of its recent restructuring, Airways hired a new management team with a wealth of experience in the U.S. airline industry. More than two-thirds of Airways's board of directors and other managing officers are U.S. citizens. Both the board and management are independent of Holdings, any other DHL company or Deutsche Post. They conduct what business they may have with DHL (or Deutsche Post) entities on an arm's-length basis.

Airways's bylaws provide for four directors, three of whom are appointed by Mr. Robinson and are U.S. citizens, and one who is appointed by Holdings. Joseph R. O'Gorman (until his sudden and untimely death on August 10, 2002) was appointed Chairman of the Board of Directors and also served as President and Chief Executive Officer of Airways. The other two Robinson directors are Roy Moulton (an experienced lawyer practicing in Idaho) and Todd Moulton (a Managing Director of Raymond James Financial). Messrs. Moulton are two long-time

⁶ Mr. Robinson has never been an officer, director, or employee of Deutsche Post; nor is now, or has he ever been, an officer, director, or employee of any other company currently affiliated with Deutsche Post.

associates and business representatives of Mr. Robinson. The Holdings director is John Fellows, a Canadian citizen and the Chairman and CEO of Holdings. (Since Mr. O’Gorman’s death, Roy Moulton has been named acting Chairman of the Board.)

The management team is composed of a group of individuals, all of whom are U.S. citizens, well-known in the U.S. airline industry, with extensive experience with U.S. cargo and passenger air carriers and corporate entities:

- As noted, the President and Chief Executive Officer was, until his death, Joseph R. O’Gorman, a renowned airline executive with over 30 years of experience who served as CEO of five domestic airlines and was the senior-most operations executive of United Airlines, USAir, and AirCal.
- Vicki Bretthauer, Senior Vice President of Operations, now also is serving as interim CEO. Ms. Bretthauer has prior airline experience with United Airlines and Reno Air.
- The remainder of the senior management team (and prior airline management experience) include Steven A. Rossum, Senior Vice President-Corporate Finance, General Counsel, Treasurer and Secretary (AirTran, Reno Air, US Airways, World Airways); Jeffrey J. Simmons, Senior Vice President Finance and Chief Financial Officer (Delta, ASA); Joanne Smith, Vice President Marketing and Planning (Reno Air, Midway, American Eagle); and Charles W. Thomson, Vice President Human Resources, Labor Relations and Administration (Federal Express, Flying Tiger, Frontier, United Airlines),

All of these individuals were hired by Mr. O’Gorman in 2001 after completion of the reorganization. None is or was an officer or employee of Holdings or any other DHL company or Deutsche Post. Thus, the composition of Airways’s board of directors and senior management clearly satisfies the second element of the citizenship test.

C. Actual Control

Airways is under the actual control of William Robinson, who owns and controls 75% of the voting interest in the carrier and is a U.S. citizen, and the company's board of directors and other managing officers, more than two-thirds of whom also are U.S. citizens. Because neither Mr. Robinson nor any of Airways's directors and other managing officers is employed by or is under the control of Holdings, DHL International, any other DHL company or Deutsche Post, there is no basis for alleging that any of them is a conduit for, or facilitator of, foreign control of Airways. While Airways continues, as it has in the past, to provide commercial air carrier services for the DHL network in the U.S., the carrier is actively marketing its services to third-parties; commercial arrangements between Airways and other DHL companies are negotiated on an arm's-length basis, and, as a factual matter, Airways satisfies the actual control test.

Federal Express and UPS have made much of the relationship between Airways and Holdings asserting, in light of that relationship, that foreign control exists. Of course, those assertions are untrue. The Department has reviewed on a confidential basis the documents effectuating the transaction and the arm's-length nature of the business relationship between Airways and other DHL companies, and has concluded that Airways is a citizen. Asserting the contrary over and over does not change the facts.

II. The Department's Handling of the Continuing Fitness Review of Airways Was Entirely Consistent With the Statute and Well-Established DOT Practice and Procedure.

Federal Express and UPS suggest that the Department's handling of its continuing fitness review of Airways somehow was inconsistent with the Department's statutory obligations and its own policies and precedents. This suggestion is totally unfounded and unfair. In fact, the Department has administered the statute entirely according to its terms and consistent with Department regulations and precedents.

It is well established that the Department handles continuing fitness reviews on an informal, non-public basis. In fact, the Department's Regulations are most explicit on this point. Section 204.5(c) distinguishes between information provided in support of an application for new or amended certificate authority, which must be filed in the public docket, and "information filed in support of a certificated or commuter air carrier's continuing fitness to operate under its existing authority in light of substantial changes in its operations, ownership or management, which shall be addressed to the Chief, Air Carrier Fitness Division."⁷

⁷ 14 C.F.R. Section 204.5(c). UPS is flatly wrong when it asserts that, under section 204.5, because the initial licensing process under Part 204 is a public proceeding, subsequent "changes in ownership and management [of a licensed air carrier], submitted to DOT staff for review under Section 204.5 should also be placed in the Docket on the original application and thus be made available to the public for review and comment to the same effect as the original information." *UPS Petition*, at 11 n.29. The explicit language of section 204.5 makes clear that continuing fitness information, unlike an initial application, shall not be placed in the public docket.

Federal Express and UPS even suggest that the Department's handling of Airways's case may represent a new policy introduced by stealth means.⁸ This is simply not true. As the complainants well know, the Department has not changed its policy or standards for reviewing continuing fitness, including citizenship, and the Department's handling of Airways's case was entirely consistent with past practice.⁹

Federal Express and UPS suggest that the Department should, nonetheless, be required to conduct a public investigation in this case. In support, both rely on the *Northwest/KLM* case (Order 89-9-51). The Department has already considered and expressly rejected this argument. In the *U.K. Fifth-Freedom All-Cargo Proceeding*, Federal Express, objecting to the Department's tentative decision to grant Airways back-up fifth-freedom authority, argued that the Department "had not properly addressed [Airways's] citizenship . . . in the show-cause order" despite the "copious objective indicia of [Airways's] foreign citizenship [put forth by Federal Express]." Order 96-1-26, at 2. In language that might as readily be culled from Federal Express's instant petition, Federal Express argued that the "public interest in knowing how the Department arrived at its decision [regarding Airways's citizenship] in face of substantial evidence in the record to the contrary

⁸ See *UPS Petition*, at 4-5 & n.11 (suggesting that DOT and Airways may have entered into a "confidential consent decree"); *Federal Express Filing*, at 1 (alleging "serious questions about the informal procedures . . . utilized by the Department"); *id.* at 15-16 (cautioning the Department that "if it wishes to change [current] policy, it must 'supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored'") (internal citation omitted).

⁹ See 14 CFR, Section 204.5(c); See also Order 90-9-15 dealing with the acquisition of stock in the parent of Continental Airlines by Scandinavian Airlines System.

strongly militates for an adequate explanation of the basis for that decision.’” *Id.*

at 3. The Department’s rejection of Federal Express’s objections was unambiguous:

We are unpersuaded by Fed Ex’s argument that a public, on-the-record investigation is necessary to resolve questions regarding DHL’s citizenship. The Department has recently reviewed the question of DHL’s ownership and control in the informal procedural context common in such cases. FedEx has advanced no new facts or arguments that justify reopening this issue.

Id. at 6 (emphasis added).¹⁰

Federal Express also cited the *Northwest/KLM Case* in support of the previous incarnation of the instant petition -- namely, the third party complaint, which the Department dismissed in May 2001. As Airways explained at that time, that case provides no authority for initiating a public proceeding to investigate Airways’s citizenship:

Federal Express’ citation to the Northwest/KLM case as supporting its claim to a public hearing is flatly wrong. Unlike this case (which is the product of a third party complaint), citizenship issues were discussed in Northwest/KLM only in the context of the Department’s continuing fitness review of Northwest. That review, consistent with then-existing and current DOT policy, was conducted in non-public proceedings between the Department and the carrier and was not, contrary to Federal Express’ erroneous assertion, part of a public proceeding. The corporate and competitively-sensitive information provided

¹⁰ In the *U.K. Fifth-Freedom All-Cargo Proceeding*, the Department also noted that Federal Express had raised the same issues in “several other proceedings.” *Id.* at 6 n.17. Today, more than six years later, Federal Express continues to use the same strategy of raising unfounded allegations about Airways’s citizenship in multiple proceedings in an effort to harass Airways and the Department. (In addition to its instant petition, see Docket OST-01-10052, in which Federal Express has submitted multiple filings objecting to Airways’s application for renewal and amendment of its certificate authority for U.S.-Mexico all-cargo service.) The strategy, while certainly successful in terms of its harassment value, continues to lack any substantive merit.

by Northwest in order to assist the Department with its fitness review was not made public; rather, the Department, appreciating the sensitivity of that information, "sought to minimize the information which must be disclosed" in the consent order. Order 89-9-51 (Wings I) at 2 n.2. As Federal Express well knows, the Department has, on rare occasions, issued written decisions memorializing its findings following completion of a carrier fitness review; this does not, however, reflect a policy to subject the fitness review process to a public proceeding. See, e.g., In the Matter of the Acquisition by British Airways, PLC of USAir Group, Inc., Order 92-9-35; Petition for Revocation of the Certificate of Public Convenience and Necessity of Private Jet Expeditions, Inc., Order 92-2-40; Petition for an Investigation into the Continuing Fitness of Wrangler Aviation, Inc., Order 91-12-51. Federal Express is attempting to use its third party complaint as a lever to interpose itself inappropriately into the Department's established arrangements for continuing fitness review of Airways.

Answer Of DHL Airways, Inc. To Motion, February 26, 2001, at 5 n.7 (Docket OST-01-8736).

Throughout the process of its restructuring, Airways consulted with and kept the Department informed of the transaction in full compliance with the Department's continuing fitness requirements.¹¹ The Department, pursuant to its well-established procedures, conducted an informal review of Airways's continuing fitness and found that Airways continues to be fit and a citizen. When the Department completed its review, it sent Airways a letter confirming that conclusion. Airways has taken no position on whether the Department should issue an order to that effect. However, Airways will continue to defend its due process rights, including the right to prevent its competitors from abusing DOT

¹¹ See Part 204 of the Department's Regulations, 14 C.F.R. Part 204.

procedures to gain inappropriate access to confidential corporate information and undermine Airways's competitive position in the marketplace.

III. Federal Express and UPS Have Distorted the Record by Misrepresenting the Facts About Airways and Introducing Evidence that is Irrelevant, Stale, or Misleading

Federal Express and UPS are well aware that Airways underwent a corporate restructuring last year and that the restructuring was the subject of the Department's recently concluded continuing fitness review.¹² Nonetheless, their filings are replete with references to documents that predate the restructuring (in one case, by more than a decade¹³), that confuse or conflate various entities that existed at different times, and that have little, if any, relevance to the current status of Airways's ownership and management. In this latest attempt to create the appearance of evidentiary support for their allegations, the complainants have grossly distorted the record by selecting and describing various snippets of information -- some of which relate to Airways before the restructuring, some of which relate to Airways after the restructuring and some of which relate to DHLWE -- and melding them together as if they related to a single entity -- Airways today.

¹² See *Answer Of DHL Airways, Inc.*, February 5, 2001 (Docket OST-01-8736); *Consolidated Answer Of DHL Airways, Inc.*, March 20, 2001 (Dockets OST-01-8736, 00-6937). Both Federal Express and UPS quote the statement in Airways's Form 41 Report dated May 13, 2002 that "beginning with First Quarter 2002, [Airways] is reporting all Form 41 financial reports based on the new company structure approved by the DOT in 2001." *Federal Express Filing*, at 2 & n.3; *UPS Petition*, at 4 & n.9.

¹³ *Federal Express Filing*, at 8 & n.14 (citing a Japanese press article dated September 23, 1989). Although UPS's citations to press articles are more current, they clearly do not constitute an authoritative source regarding Airways's current ownership and management. See *UPS Petition*, at 7-8 nn.16, 17, 18, 22.

In support of this effort, both complainants proffer various quotes from the following:

- a) certain filings made by DHLWE and Airways with the Federal Communications Commission ("FCC") in 2001;
- b) Airways's Report of Financial and Operating Statistics for the first quarter of 2002 ("Form 41 Report"), which Airways filed with the Department on May 13, 2002; and
- c) a presentation dated March 13, 2002 made by a mid-level DHLWE manager at an FAA conference.

None of these documents, however, provides even a modicum of support for Federal Express's and UPS's claims. Airways addresses each of them in turn:

A. The FCC Filings

Both complainants offer as exhibits two filings made with the FCC: a February 27, 2001 application by Airways for assignment of certain land mobile licenses to DHLWE ("FCC Filing of February 27, 2001") and an attachment dated May 3, 2001, to an October 12, 2001 amendment to an earlier filed application to transfer control of certain licenses held by Airways to DHLWE ("FCC Filing of October 12, 2001").¹⁴ Federal Express and UPS ignore the fact that these filings

¹⁴ That the attachment from which Federal Express quotes was filed on May 3, 2001 is specifically noted on page 5 of the amendment, in the box identified as "Attachment List." Federal Express describes the FCC filings as having been "recently uncovered," thereby implying that it has managed to extract them from their burial in the obscure nether regions of the FCC bureaucracy. *Federal Express Filing*, at 3. In fact, those filings are, and have long been, available publicly on the FCC's web site.

were made¹⁵ before the restructuring was completed, and obscure the information in them to suggest that Airways is not a U.S. citizen.

In fact:

- Both FCC filings contained specific details about the nature of the ownership of DHLWE and Airways at the time they were filed in 2001.¹⁶ All such information was accurate when filed.
- The filings also make abundantly clear that the DHL corporate reorganization had not closed as of the time of the February 2001 filing. As for the October 2001 filing, it was an amendment of a May 2001 filing that was made at the request of the Commission to delete a reference to a license that had expired. The attachment to the filing upon which the complainants rely was a part of the original May 2001 filing and reflects facts as of that date, which also was prior to the closing of the reorganization.¹⁷ Yet, inexplicably, Federal Express in particular uses the FCC filings to draw definitive conclusions about Airways's current, post-reorganization ownership arrangements.¹⁸ Clearly, they permit no such conclusions.

¹⁵ The February 27, 2001 filing stated that the requested assignment was "part of a reorganization of the existing DHL corporate structure." *FCC Filing of February 27, 2001*, at 6. The filing made clear that such reorganization had not yet occurred. *See id.* (describing events that would occur "[f]ollowing the restructuring..." and "[a]fter the reorganization..." (emphasis added)); *see also FCC Filing of October 12, 2001*, at 6 ("[a]s a result of the contemplated transaction"; "[a]s a result of the transaction, there will be a transfer of control of [DHLWE]." (emphasis added)).

¹⁶ *See FCC Filing of February 27, 2001*, at 6 (explaining that DHLWE had been created as a wholly-owned subsidiary of Airways as "part of a reorganization of the existing DHL corporate structure. Currently, Airways, a Nevada corporation, operates the integrated DHL air express package delivery business, including both airline and ground operations. After the reorganization, Airways will operate the airline operations and the ground operations will be operated by [DHLWE], a Delaware corporation."). The application then explained that the restructuring would result in Airways retaining all of the airline operations and assets, while ground operations and assets would be transferred to DHLWE. Finally, the application explained that, at that time, Airways was a wholly-owned subsidiary of Holdings and described the then ownership of Holdings. *See also FCC Filing of October 12, 2001*, at 6.

¹⁷ As noted above, Federal Express and UPS both are aware that the reorganization is now complete. *Federal Express Filing*, at 2 & n.3; *UPS Petition*, at 4.

¹⁸ *Federal Express Filing*, at 5 ("FCC filings by the DHL network reveal foreign control over DHL Airways"); *id.* at 9 ("[t]hese representations to the FCC cannot be reconciled with a Department finding that DHL Airways remains a U.S. citizen"); *id.* at 3 (based on the FCC filings, "it is manifestly impossible to conclude that DHL Airways' corporate structure can meet its citizenship requirements"); *id.* at 5-6 (alleging that statements in the FCC filings not only demonstrate that Airways is not a citizen but facially violate "the Department's longstanding policy against foreign ownership of more than 49% of the equity of a U.S. air carrier").

- UPS does not draw such definitive conclusions from the FCC filings, but it does cite the information from these dated filings as if it were relevant to the new Airways structure, even though UPS is aware of the entirely changed circumstances.
- As stated above, the FCC filings provided information that was accurate at the time of filing. The statements in those filings anticipated and specifically referenced the reorganization, but did not purport to describe Airways's future ownership upon completion of the reorganization; in fact, Airways was only mentioned in passing in the context of explaining the ownership of DHLWE, which was the recipient of the FCC licenses at issue. The May 3 materials, which are attached to the October 12, 2001 document, specifically noted that "the parties are filing a separate application for [FCC] approval for the transfer of control of Airways, which holds aviation radio navigation and aircraft licenses."¹⁹ Yet Federal Express and UPS disregard that statement and misrepresent that the filing addresses Airways's current ownership.
- The public FCC filings, despite Federal Express's sensationalistic claim that it "recently uncovered" them, do not constitute new or relevant evidence about Airways's current ownership. They provide no basis for granting Federal Express's or UPS's petition or initiating any further investigation into Airways's ownership.

Federal Express and UPS also use the FCC filings as supposed evidence to support an assertion that Airways is (or may be) subject to indirect foreign control because, they erroneously allege, certain individuals employed by DHL companies hold an indirect ownership interest in Airways:

- In support of these allegations, they cite statements in the FCC filings that, at that time (*i.e.*, prior to completion of the reorganization), three individuals each had a five percent or greater interest in what was then Holdings: William A. Robinson, John J. Atwood and Kenneth D. Sato. Federal Express then suggests, with no support whatsoever, that these individuals are currently DHL employees. *Federal Express Filing*, at 6 (describing the individuals as "long-term employees of the DHL network"). UPS begins its analysis more even handedly: "it is unclear whether these individuals remain

¹⁹ See the May 3 materials attached to the *FCC Filing of October 12, 2001*, at 6 n.1. That separate application was filed but subsequently withdrawn at the FCC's request after the licenses at issue expired.

employees or, if so, for which DHL entity they work.” *UPS Petition*, at 9. In the next sentence, however, UPS, having just acknowledged that it does not know whether these individuals are DHL employees, nevertheless continues building its house of cards, concluding that: “In any event, *being employees of DHL* raises issues regarding their independence.” *Id.* (emphasis added).

- Federal Express and UPS go on to suggest that non-citizens somehow exercise actual control over Airways by controlling these three individual shareholders of the former Holdings, all of whom (according to Federal Express and UPS) are long-term DHL employees. However, these assertions about the current employment status of Messrs. Robinson, Atwood and Sato are simply wrong and they provide no support for the equally unfounded allegation that any of these three individuals could be a conduit for foreign control of Airways.

Apart from the fact that Federal Express and UPS are wrong on the fact, they are again simply ignoring the fact that the FCC filings on which their allegations are premised were made in 2001, before the reorganization was concluded. The current and correct facts are that:

- Neither John Atwood nor Kenneth Sato is an officer, director, or employee of Airways; indeed they are not involved in Airways at all, having been bought out as part of the reorganization. Thus, they cannot be a conduit for foreign control of Airways.
- In conjunction with the DHL reorganization, William Robinson invested his personal funds to become the majority shareholder in Airways (as described above). He is not an officer, director or employee of any other DHL company or Deutsche Post; as the principal investor in Airways, his interest is in the success of Airways, which he (and he alone) majority owns and controls in conjunction with Airways’s directors and managing officers.²⁰

²⁰ Federal Express erroneously asserts that Airways’s case is analogous to *Willye Peter Daetwyler, D.B.A. Interamerican Airfreight Co.*, 58 C.A.B. 118 (1971) and *Premiere Airlines, Inc.*, Order 82-5-11. In the *Daetwyler* case, the CAB determined that the carrier was not a U.S. citizen because, although it met the numeric statutory ownership test, Daetwyler, a Swiss citizen, was in a position of control over the carrier. The CAB found that “the U.S. citizen stockholders, officers, and directors are employees of other admittedly Daetwyler-controlled corporations, with interests which could be expected at the very least to represent a substantial inducement upon such employees to follow the wishes of Daetwyler.” *Daetwyler*, at 120; see also *id.* at 120 n.6 (“[t]he majority of the income of such employee stockholders is derived from the salary they receive from such other Daetwyler

Thus, an examination of the facts demonstrates that Federal Express's and UPS's reliance on out of date quotes from the FCC filings is entirely inappropriate, and that those filings do not provide any support for the contentions of the complainants that Airways is not (or may not be) a citizen.

B. Airways' Form 41 Report

Federal Express and UPS also proffer an excerpted copy of Airways's Form 41 Report dated May 13, 2001 in a similarly distorted attempt to demonstrate that Airways is controlled by a foreign entity -- this time Holdings, its minority shareholder. Thus, for example, Federal Express and UPS point out that, under the ACMI agreement negotiated by Airways with Holdings (the main commercial agreement governing Airways's activities for the DHL network), the latter pays for fuel and certain other costs.²¹ Federal Express also claims that Airways must be

corporations"). In the *Premiere* case, an Administrative Law Judge ruled that the carrier was subject to foreign control because Joseph J. Cicippio, the nominal U.S. citizen owner of *Premiere*, had borrowed \$2.5 million from his Saudi employer to invest in the carrier. The ALJ found that the Saudi employer "had a substantial interest in *Premiere*'s successful operation and was in a position to exert overriding influence and control over Mr. Cicippio and, through him," the carrier. Order 82-5-11, at 2. The CAB ultimately deemed the carrier to be a citizen after it agreed to restructure itself to prevent foreign control.

Contrary to Federal Express's assertions, the facts of Airways's ownership are quite distinct from those in the *Daetwyler* and *Premiere* cases. In both of those cases, the U.S. citizen owners essentially were "front men" for foreign interests. In this case, by contrast, Airways's principal shareholder, William Robinson, is an independent investor who purchased his ownership stake in Airways with his own money and is not employed by any of the DHL companies or Deutsche Post. Thus, unlike the U.S. citizen owner in *Daetwyler*, Mr. Robinson is not an employee of any foreign-owned or controlled company and does not derive any income whatsoever from a salary from any such company. Moreover, unlike Joseph Cicippio in the *Premiere* case, Mr. Robinson used his own money to acquire his 75% voting interest in Airways.

²¹ UPS has accused Airways of "mir[ing]" its citizenship in "obscurity, contradiction and confusion." *UPS Petition*, at 6. Yet, if Airways's intent is to conceal its control by Holdings, it seems to have made no effort at such "obscurity, contradiction or confusion." The Form 41 Report explicitly and candidly refers to Holdings as Airways's "primary customer."

controlled by Holdings because Airways's Form 41 Report suggests that Airways consumed a relatively small amount of fuel in performing charter services for third parties.

Airways's Form 41 Report does not, however, support in any way the claim that Airways is controlled by Holdings:

- As Federal Express and UPS well know, agreements of this sort commonly provide for the lessee to pay for fuel and a wide range of other operating costs. Moreover, the fact that specific terms in that agreement are supposedly favorable to Airways is hardly an indicia of control by Holdings.²²
- As part of the restructuring, Airways hired a new management team, which has extensive experience in the U.S. airline business and no ties (current or prior) to any other DHL company or Deutsche Post. Airways's new management has sought to negotiate the best terms possible with Holdings and other customers in order to ensure Airways's long-term profitability and success.
- An important part of Airways's business plan is to expand its customer base. That objective is particularly challenging under recent market conditions, especially since September 11, 2001, when the airline industry has faced some of the most adverse business conditions in its history. Nonetheless, Airways will continue vigorously to pursue that objective. In any event, the amount of fuel consumed in charter services has no relevance whatsoever to the issue of Airways citizenship.
- It is not surprising that Federal Express and UPS are harassing Airways and trying to undermine the confidence of Airways's customers. Federal Express and UPS, the two dominant competitors in the U.S. domestic airfreight market, have the most to lose if Airways succeeds in expanding its customer base. Even if Airways's success in that regard were to be limited,

²² If Federal Express and UPS were trying to establish that it was Airways that controlled Holdings, no doubt they would cite such favorable terms as evidence that Airways had superior bargaining power and was exerting control over Holdings. The terms of the ACMI agreement do not support a conclusion that Airways, a carrier in which Holdings has only a minority interest, is somehow controlled by Holdings.

competition from Airways may restrict to some extent Federal Express's and UPS's ability to raise prices.²³

C. The FAA Presentation

Finally, both Federal Express and UPS attach a copy of a short PowerPoint presentation made by Tim Howard, a mid-level employee, not of Airways, but of DHLWE, to an FAA conference on March 13, 2002. That presentation indicates that the new Holdings is a wholly-owned subsidiary of DHL International (Brussels) and that Holdings owns a minority stake in Airways. Those statements are correct and entirely consistent with the details of Airways's ownership set forth above. Holdings, which is not a U.S. citizen, is a minority shareholder in Airways; it holds 25 percent of the voting shares of Airways, consistent with the statutory citizenship requirement.²⁴ The presentation does not support Federal Express's and UPS's filings; to the contrary, it merely restates the facts of Airways's ownership, which provided the basis for the Department's recent decision confirming that Airways remains a U.S. citizen.

²³ See William Armbruster, "Round two," *Journal of Commerce*, Aug. 19, 2002 ("[a]ny loss of DHL's operating certificate . . . would give Federal Express [and] UPS more pricing leverage").

²⁴ Federal Express also quotes a statement from the same presentation that "DHL Holdings (USA) is 'responsible for selling, *transporting* and servicing shipments originating in the U.S.'" See *Federal Express Filing*, at 10 & n.20, quoting DHLWE Presentation, at 2 (emphasis added by Federal Express). By underlining the word "transporting," Federal Express apparently means to imply that there is something sinister about Holding's participation in transportation services in the United States. This is a red herring: Holdings owns DHLWE, which is a foreign air freight forwarder registered under Part 297 of the Department's Regulations. DHLWE, as a freight forwarder, offers transportation services in the United States, consistent with the terms of its DOT authority.

IV. Federal Express and UPS are Engaged in a Highly Political Campaign to Protect Their Huge Combined Share of the U.S. Market.

Federal Express and UPS, through an apparently endless succession of filings with the Department, and in other media, have widely publicized their unsubstantiated allegations and innuendo about Airways in order to pressure the Department to launch a public investigation into Airways's citizenship. As demonstrated above, and as the Department has already concluded, Airways's citizenship and fitness require no further investigation. If anything, the Department should consider investigating the ongoing conduct of Federal Express and UPS, the two competitors with the largest share of the U.S. domestic airfreight market, in expending extensive resources in a concerted effort to drive Airways, a much smaller competitor, out of business, and thereby undermine the cooperation of the DHL network in the U.S.

We do not believe that Federal Express and UPS have been forthcoming about the real motives and objectives behind their relentless campaign against Airways; nor do we believe have they acknowledged the extent of their mutual cooperation. In explaining their purpose, they tend to cite abstract, high-minded public policy principles, such as the need to preserve the integrity of the Department's procedures and rights negotiated in bilateral inter-governmental aviation agreements.²⁵ Such invocations, however, seem to be a smoke screen

²⁵ See, e.g., *Federal Express Filing*, at 17 (expressing a purported concern about the U.S. goal of "worldwide liberalization" of air transport services); *UPS Petition*, at 11 (suggesting that its petition concerns "a matter of

designed to obscure their actual purpose. Federal Express and UPS, which are by far the two largest competitors in the U.S. domestic airfreight market, appear engaged in a campaign, characterized by mutual cooperation and significant expenditures of legal fees and lobbying expenses, with one objective in mind: to undermine the reputation of the DHL network in the United States, driving a much smaller competitor out of business. In short, the issue here is competition or, more precisely stated, the desire of Federal Express and UPS to affect the political and regulatory process to avoid competition to their mutual benefit.

Federal Express's and UPS's filings provide clear evidence of the collusive nature of the their campaign against Airways. The two documents were filed within two days of each other and rely on essentially the same arguments and almost exactly the same alleged "evidence." This bespeaks, not of coincidence, but collusion in furtherance of a mutual interest in eliminating Airways as a competitor.

Federal Express and UPS know that, even though their arguments are recognized to be without merit, their concerted campaign will pay dividends if it raises questions in the minds of Airways's customers concerning Airways's future ability to compete. To that end, it seems that Federal Express and UPS have obfuscated the facts about Airways's citizenship at least in part to interfere with and destabilize Airways's relationships with its customers. If Federal Express and

principle"); *Third Party Complaint And Request To Commence Enforcement Proceeding Of Federal Express Corp*, January 19, 2001, at 16 (suggesting that it is motivated by concern about "bad public policy").

UPS were to succeed in their apparent final objective of forcing Airways out of the U.S. market, the jobs of Airways's employees would be jeopardized, the range of competitive service options available to shippers would be diminished, and Federal Express and UPS would be better able to exploit their market power to impose higher prices, to the detriment of consumers. None of this would be in the public interest, although clearly it would be highly beneficial to the common interests of the complainants.

The Department has authority to investigate and prohibit unfair or deceptive competitive practices and unfair methods of competition in air transportation. 49 U.S.C. § 41712. If any formal investigation is warranted in this case, it should focus on whether ongoing, predatory collusion between Federal Express and UPS, "the two goliaths of the U.S. express industry,"²⁶ misrepresenting the facts about Airways to the Department, Airways's customers and the public, constitutes a continuing violation of section 41712.²⁷

²⁶ William Armbruster, "Round Two," *Journal of Commerce*, Aug. 19, 2002.

²⁷ Federal Express's and UPS's conduct, involving concerted action by two dominant participants to undermine a competitor's market position, also is inconsistent with the antitrust laws. Although the *Noerr-Pennington* doctrine provides that a competitor may exercise its First Amendment right to petition the government without violating the antitrust laws, such immunity does not apply if those efforts are a "mere sham to cover . . . an attempt to interfere directly with the business relationships of a competitor." *Eastern Railroad Presidents Conference v. Noerr Motor Freight Inc.*, 365 U.S. 127, 144 (1961); see also *Neumann v. Reinforced Earth Company*, 786 F.2d 424, 427 (D.C. Cir. 1986) (the antitrust laws prohibit predatory litigation undertaken for the sole purpose of weakening or eliminating a competitor). Of particular applicability to Federal Express' petition, courts have stated that misrepresentations made to an administrative agency as part of the adjudicatory process are not immunized. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972); *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500 (1988) ("unethical and deceptive practices can constitute abuses of administrative or judicial processes that may result in antitrust violations").

V. The Department Should Investigate Whether Federal Express and UPS Have Violated the Department's Rules of Practice and Rules of Conduct.

A. Violations of Rules of Practice

Federal Express's and UPS's instant filings are the latest in a long line of repetitive pleadings intended, regardless of legal merit, to harass Airways and discredit its reputation and relationships with its customers. A consistent feature of this ongoing campaign has been a flagrant disregard for the Department's Rules of Practice. The Department's forbearance in tolerating these abuses with respect to prior Federal Express and UPS pleadings attacking Airways and DHLWE seems only to have emboldened Federal Express and UPS because the instant filings reflect a particularly egregious disregard for the Department's Rules of Practice.

Those Rules authorize parties to file various specific forms of pleadings under specific circumstances and subject to specific requirements. Neither Federal Express's nor UPS's filings conform or even bear any relation to any authorized form of pleading.

In order to defend the integrity of its Rules of Practice, the Department should dismiss both filings as unauthorized and consider investigating Federal Express and UPS for abuse of process.

B. Violations of Rules of Conduct

Federal Express, having introduced its pleading by alleging that there are "very serious questions" about Airways's citizenship, then concludes that Airways

“has adopted a duplicitous strategy . . . [that] makes a mockery of federal law.” *Federal Express Filing*, at 1, 17. Federal Express also accuses Airways of making “conflicting representations” to different U.S. government agencies. *Id.* at 2. These are extremely serious charges that cannot be raised in a manner consistent with the Department’s Rules of Conduct in Proceedings absent clear and incontrovertible supporting evidence.

Under the rules of professional conduct,²⁸ it is abundantly clear that Federal Express is required to provide evidence in support of such allegations that it knows or reasonably believes to be true. Federal Express has not met this standard. Instead, it has taken various discrete statements – statements that relate to different entities that exist or existed at different times – and melded them together to create a false description of the current ownership and managements structure of Airways. Federal Express then relies upon this distorted and seemingly manipulated record, not simply to suggest there may be unanswered questions about Airway’s citizenship, but definitively to assert that Airways is not a citizen and to accuse Airways of unethical behavior. Airways respectfully suggests that the Department consider whether such misrepresentations and baseless accusations constitute violations of the Department’s Rules of Conduct and judicial standards of conduct in Department Proceedings.

²⁸ Applicable judicial standards of conduct in Department proceedings include the Federal Rules of Civil Procedure, *See* Rule 11(b)(1),(3) and the D.C. Bar Rules, *See* Rule 3.3(a)(1),(4) and Rule 3.3 Comment [2].

VI. Conclusion

For the reasons set forth in this Answer, DHL Airways respectfully requests the Department dismiss the filings of Federal Express and UPS consolidated in this docket. In addition, the Department should consider investigating whether the conduct of the complainants constitutes an unfair competitive practice, whether the complainants have violated the Department's Rules of Practice and, specifically, whether Federal Express has violated the Rules of Conduct.

Respectfully submitted,



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September 6, 2002



U.S. Department of
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Assistant General Counsel
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400 Seventh St., S.W.
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MAY 1 2002

Stephen H. Lachter, Esq.
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Dear Mr. Lachter:

This letter is in reference to our on-going informal investigation regarding the citizenship of DHL Airways, Inc., under Title 49 of the U.S. Code.

We have carefully examined the information and documents that you have provided us during the course of DHL Airways' reorganization. Based on that material and on discussions with you and DHL Airways' officers, it is our opinion that DHL Airways continues to satisfy the statutory citizenship requirements applicable to U.S. carriers.

We appreciate your cooperation in this matter.

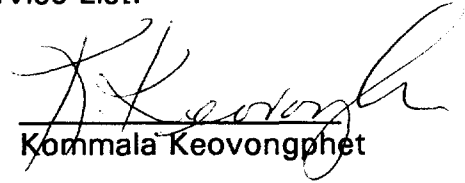
Sincerely,

A handwritten signature in black ink, appearing to read "Donald H. Horn", with a long horizontal flourish extending to the right.

Donald H. Horn
Assistant General Counsel
for International Law

CERTIFICATE OF SERVICE

I hereby certify that I have served copies of the foregoing Consolidated Answer of DHL Airways this 6th day of September, 2002 by first class mail, postage prepaid to all persons on the attached Service List.



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